United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

203

No. 21,434

GEORGE W. BATES, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court for the District of Columbia

NELSON DECKELBAUM
1140 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

June 26, 1968

STATEMENT OF QUESTION PRESENTED

Did the totality of circumstances surrounding a one-man line-up held in the rear of an enclosed police wagon deprive the Appellant of his Constitutional right to due process of law and result in tainted in-court identifications of the Accused.

TABLE OF CONTENTS

INDEX TO CITATIONS

Cases:

INDEX TO CITATIONS
(Continued)

*Cases principally relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,434

GEORGE W. BATES, Appellant

v.

UNITED STATES OF AMERICA, Appellee

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The indictment of the grand jury, filed in the United States District Court for the District of Columbia on September 14, 1966, charged Appellant in four counts, to-wit: (1) entering the complaining witness' apartment with intent to commit larceny therein; (2) with entry of the same apartment with intent to commit an assault therein; (3) assault with a dangerous weapon on one Barbara C. Nichols; and (4) assault with a dangerous weapon on one Jennie Skerl. The District Court had jurisdiction under 11 D.C. Code §521. The final judgment and commitment adjudging the defendant guilty of one count of housebreaking (Count Two) and two counts of assault with a dangerous weapon, was entered on March 23, 1967. On October 16, 1967, the District Court, Sirica, J., granted the Appellant leave to appeal in forma pauperis. This court has jurisdiction of an appeal from such a final decision by virtue of 28 U.S.C. §1291.

APPELLANT'S STATEMENT OF THE CASE

The indictment alleged in four counts that the defendant entered the apartment of Barbara C. Nichols and Jennie Skerl, with intent to commit larceny therein (Count 1); with intent to commit an assault therein (Count 2); and with assaulting each of the apartment's two occupants with a dangerous weapon, to wit, a knife (Counts 3 and 4). The jury was advised that Counts 1 and 2 were inconsistent; that Appellant could not be found guilty of both; but that if they found Appellant guilty of one of said counts, they should not return a verdict as to the other. The jury did not return a verdict as to Count 1 and found the Appellant guilty of Counts 2, 3, and 4.

Subsequently, defendant was sentenced to from five (5) years to fifteen (15) years on Count 2; three (3) years to ten (10) years on Count 3; and three (3) years to ten (10) years on Count 4, said sentences to run concurrently. (R)*/

The facts as they were developed at the trial are as follows:

On the evening of July 12, 1966, Miss Jennie Skerl and Miss Barbara C. Nichols, roommates in a third-floor apartment at premises 1262 New Hampshire Avenue, N. W., were preparing to retire for the evening. Miss Skerl went to sleep at approximately 11:00 p.m., while Miss Nichols wrote a few letters and retired to bed at 11:30 p.m. (Tr. 9-11) Shortly thereafter, Miss Nichols noticed the figure of a person pass by the open door of the bedroom. She called out and the figure entered the darkened bedroom, at which time Miss Skerl awakened. The figure said,

---

*/ The record filed in this court is cited (R_____); the transcript below is cited (Tr._____).

"Don't move, or I will shoot." (Tr. 12). Conversation between the participants continued, with the intruder ordering Miss Nichols to her roommate's bed; thereafter sitting on the edge of the bed, and finally exposing a knife.

From this point on, Miss Skerl's testimony parallels that given by Miss Nichols, which will be related below, with the following exception. Upon direct examination by the government, Miss Skerl testified that she could not identify the intruder (Tr. 173) other than that he was a man of small build; had a long shaped head; and was wearing dark-colored work clothes. (Tr. 168).

Miss Nichols then testified that the intruder ordered Miss Skerl to cover her head with a sheet and then began to talk to her and to touch her breasts and vagina. (Tr. 14). The intruder then placed the knife on a small table next to the bed, at the request of Miss Nichols; and upon the intruder's momentary distraction by Miss Skerl, Miss Nichols grabbed the knife from the table. After a brief struggle she succeeded in breaking away from the intruder and threw the knife out of the window. The struggle continued, and the man broke away and ran from the apartment. (Tr. 16-18). Miss Nichols testified that she could identify the intruding individual if she saw him again. She then identified the defendant in the courtroom.

Miss Nichols testified that a short time later she was asked by a young man to come downstairs, and that she and Miss Skerl did so. (Tr. 32).

They proceeded downstairs to the street where there were many police vehicles, among which was a patrol wagon. (Tr. 32-33). Miss Nichols testified that she was asked to identify the defendant (Tr. 132-33) by a police officer; that

they said "Look at this man." (Tr. 134); and that at this time the Appellant was in the patrol wagon. (Tr. 134)

Miss Nichols testified that at the time she identified the Appellant he was the only person occupying the patrol wagon. (Tr. 135).

Miss Nichols further testified that she was asked by a police officer "to walk over to the back of the wagon with him and to look at the man." (Tr. 145)

Miss Skerl testified that she and Miss Nichols were asked to come downstairs; that there was a patrol wagon there; and that "they had brought a patrol wagon with a suspect in it." (Tr. 175). She further testified on cross-examination that she had a conversation with members of the Police Department and that she was asked to identify a person who was supposedly the suspect, (Tr. 180) (Tr. 184), and that the police officers asked her if she could identify the Appellant as the man who was in the apartment. (Tr. 186).

Testimony was given by several other prosecution witnesses, placing the defendant in the vicinity of the scene of the incident. Officer Lewis of the Metropolitan Police testified that he was patrolling in the area, heard screams, saw a man running in the vicinity of the apartment, and saw an individual who he could not identify; but that the defendant resembled that person. (Tr. 195-201). Officer Estrada testified that he and Officer Aquilina were on duty in plain clothes in a nearby park on an assignment unrelated to the instant case; that they heard screams; that they started toward the screams; and that he observed a person, whom he identified at trial as the defendant, running. (Tr. 210-217). Private Aquilina's testimony was substantially the same. (Tr. 227).

On cross-examination, Officer Aquilina testified that he observed the defendant while he was in custody when he was returned to the scene. (Tr. 231).

Other testimony was introduced by the prosecution placing the Appellant in the area. (Tr. 235). No testimony other than that of the complaining witness Barbara C. Nichols placed the Appellant inside the apartment.

Miss Nichols testified that she noticed nothing unusual about the intruder's speech. (Tr. 121-122). Defendant's witness, Rosemary Brown, testified that the Appellant has a noticeable speech impediment. (Tr. 314). This testimony was corroborated by Isaac Bailey, also a witness for the defense. (Tr. 318).

STATEMENT OF POINTS

That the confrontations and identifications of the Appellant, while seated alone in the rear of a police patrol wagon, were so unnecessarily suggestive and conducive to mistaken identification, viewed in light of the totality of the circumstances surrounding the confrontations and identification, as to deny the Appellant due process of law; and that any identification of the Appellant subsequent to the one-man police wagon line-up was tainted by such police-wagon identification.

With respect to this point, Appellant invites the Court's attention to the following pages of the reporter's transcript of his trial in Criminal No. 1080-66: Tr. 32-33; 132-135; 145; 168; 173-175; 180-186; 195-201; 231; 9-18; 121-122; 210-217; 227; 235; 314; 318.

SUMMARY OF ARGUMENT

The essence of the Appellant's case is that he was denied his constitutional right to due process of law, when the only person whose testimony placed him at the scene of the crime and who identified him as the culprit, initially identified him while he was seated alone in the rear of a police patrol wagon.

The Appellant argues that he should be allowed to proffer the point on appeal, although it was not raised at trial, because at the time of his arrest and at the time of trial the proper method of attacking the identification above was on a credibility basis, and that under the circumstances he should be allowed to raise this on appeal.

Because of the setting and manner of his identification, the in-court identification of the Appellant was tainted by the prior police-wagon identification; and the in-court identification was essential to his conviction. Since the transcript of the proceedings below confirm that no other eye-witness identification of the Appellant was made, the Appellant should not have been convicted merely for being in the vicinity of an unpleasant incident; that taken in this light, the Appellant's guilt could not be established "beyond a reasonable doubt."

ARGUMENT

THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE ONE-MAN LINEUP HELD IN THE REAR OF A POLICE WAGON DEPRIVED THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW RESULTING IN TAINTED IDENTIFICATION OF THE APPELLANT AT THE TIME OF TRIAL.

On June 12, 1967, decisions were announced by the Supreme Court in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, which held that an accused is entitled to the attendance of his counsel at a police lineup. The

Supreme Court also decided in the companion case of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), that the doctrine of the Wade and Gilbert cases was prospective only and that their application was limited to cases in which lineups without counsel occurred after June 12, 1967. Since the one-man police-wagon lineup of the Appellant here occurred prior to the Wade and Gilbert doctrine, the doctrine which they announced prospectively is inapplicable to the Appellant.

Appellant is not precluded, however, from inquiry into the "totality of the circumstances" surrounding his identification, to determine whether this procedure was so unfair as to deprive him of a fair trial. Stovall v. Denno, supra at 302, 87 S.Ct. 1951; and see Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966).

The fact that Appellant's appointed trial counsel did not raise the issue at trial can be attributed solely to the fact that the occurrence out of which Appellant's arrest arose occurred in July 1966, and his trial was held in February 1967. At the time of his trial it was the established rule to attack such a now improper identification on the basis of credibility and the weight it should be given as evidence, and not upon a sixth amendment (Wade, Gilbert) or due process basis (Stovall). Appellant's trial counsel did, in fact, raise this point at trial in a manner befitting that in use at the time (Tr. 132-135). It is therefore respectfully submitted that the fact that the question was not broached in the District Court is understandable, and although an issue proffered on appeal should normally be raised and decided in the trial setting, it should be allowed in this court under the circumstances. Wright v. United States, U.S.App.D.C. No. 20, 153, 96W.L.R. 341(1968) Note 22.

In each case of the trilogy of Wade, Gilbert, and Stovall, the Supreme Court's concern was that irregularities in the lineup might lead to incorrect identification and consequent conviction of the wrong person. Of the irregularities which the court noted, almost all were procedures by which the police might purposely or innocently influence the witness to identify the man the police thought to be guilty. Irregularities of this kind easily rise to the occasion of being denials of due process.

In the instant case, the transcript of proceedings below amply demonstrates that the entire incident, taken in the totality of the circumstances, reflects a basic unfairness and injustice. The Appellant was arrested blocks away from the scene and was then returned to the scene where, while sitting in the rear of an enclosed police van, he was identified by one of the complaining witnesses. (Tr.135-130). The other complaining witness followed the same procedure, with the exception that she was unable to positively identify the accused. (Tr.173). There is ample testimony showing that the identification of the Appellant, no matter how innocently suggested, was procured by the police. Miss Skerl testified that she knew that there was a suspect in the police wagon. (Tr.135-130). She further testified that she was told by the police that they had a man for her to look at. (Tr.145). Even if the police had not said these things, the inference that the Appellant was the intruder in their apartment was plain. He was sitting alone in the rear of a police van. Could he have been anything other than the man the police thought was the culprit?

The very act, innocent as it may be, of asking a victim to identify an accused shortly after she complained of an occurrence, while he sits alone

within the closed walls of a police wagon, constitutes a basic denial of due process as mentioned in Stovall, supra, and Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966).

There was no necessity for holding the one-man lineup under the circumstances in which it was held.

The most serious irregularity announced in the Palmer decision was to present a lone suspect. The court reasoned that "when the identifier is presented with no alternative choices, there is .. .. .. a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect." 359 F.2d at 201. In Stovall the Supreme Court agreed with the findings of the 4th Circuit. It specifically notes that "the practice of showing suspects singly to persons for the purpose of identification and not as part of a lineup has been widely condemned." 87 S.Ct. 1972.

In the case of United States v. O'Conner, D.C.D.C., Crim. No. 382-66, Judge Gasch, in a written opinion, listed certain criteria that should be considered in light of this court's opinions in Wise v. United States, _____U.S.App. D.C._____, 383 F.2d 206(1967), and Wright v. United States, supra. The following is a quote from that opinion:

> "Therefore, with these cases in mind, the court concluded that the following factors are relevant in determining whether a pretrial confrontation between a suspect and the identifying witnesses was 'so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.'
>
> "1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?
>
> "2. Where did the confrontation take place?

"3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?

"4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?

"5. Were any tangible objects related to the offense placed before the witness that would encourage identification?

"6. Was the witness' identification based on only part of the suspect's total personality?

"7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

"8. Was the emotional state of the witness such as to preclude objective identification?

"9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

"10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

"Other factors will also be significant in a particular case."

In the Stovall decision, the court enunciated the due process approach to one-man lineups, while affirming the conviction of Stovall. The court pointed to the necessity of bringing the petitioner to the hospital to be identified because of the fear that the witness was near death. No such compelling necessity can be shown here. The Appellant was in custody and the complaining witness' good health cannot be questioned. Appellant should have been taken to the nearest precinct, processed, and booked, and then subjected to a proper lineup;

where, among persons of similar appearance, a proper and fair identification with all of the attending incidents of fair play and due process could have been held.

Counsel for Appellant is not unmindful of the principles announced in Wise v. United States, 383 F.2d 206 (1967), and Simmons v. United States, 88 S.Ct. 967 (1968) with regard to the necessity of prompt identification after the incident or occurrence complained of, but must distinguish these cases as follows:

1. In Simmons, " * * * the bank robbers were still at large, the F.B.I. had to quickly determine whether it was on the right track in looking for Simmons. The witnesses' memories were fresh because the robbery was but a day old." Quoting Biggers v. State of Tennessee, 88 S.Ct. 979 (1968) at 980. In the instant case, Bates was in custody and his identification could have been held the next morning (just hours away) under proper conditions, without impairing the freshness of the identifying witnesses' memory.

2. In Wise v. United States, supra, a fresh identification was made. But in Wise, there is no indication that the accused was in the rear of an enclosed police wagon.

The placing of a suspect in a police vehicle within a short time after a witness has undergone a harrowing experience is so pregnant with prejudice, in light of the "totality of the circumstance," as to be a denial of basic due process.

The fact that the police may not have said to the complaining witness, "We have a 'suspect' for you to identify," as heretofore mentioned and as found in Biggers v. Tennessee, supra, is of no relevance; for, viewed in the light of his condition at the time of identification, what else could he have been other than a suspect.

As outlined above in the quoted paragraphs from United States v. O'Conner, D.C.D.C., Crim. No. 382-66, the criteria to be considered show that Appellant was denied due process. (1) He was the only individual that could possibly be identified as the guilty party; (2) The confrontation took place in the rear of an enclosed police vehicle; (3) There was no compelling reason for a prompt confrontation; (8) The complaining witness had just been held at knifepoint and had been fondled by the person in her apartment, and by waiting a few hours her emotional state could not have been rampant with the same possibilities, or probabilities, of failure to make an objective identification.

Counsel for Appellant must again bring to the court's attention that the record is not devoid of testimony inferring suggestions that the complaining witnesses were about to be shown a suspect. The fact of Appellant's geographical setting can only be considered the dressing on the meal.

The testimony was also adduced at trial that the intruder was a Negro wearing green work clothes, and that at the time of his arrest, Appellant, a Negro, was wearing green work clothes. Surely, these identifying factors could serve merely to put Appellant in a large class and did not relate him to features specifically identifiable to him. Biggers v. State of Tennessee, 88 S.Ct. 979 (1968).

Due process requires that the authorities in this case, the Metropolitan Police Department, "to avoid offending some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330,332,

87 L.Ed. 674 (1934); Accord, Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606. To allow conviction upon identification procured by the means hereinabove outlined offends just such a principle of justice.

Appellant urges that the circumstances surrounding the one-man police-wagon lineup where the confrontation with the complaining witnesses and the identification took place, were not the product of the witnesses' objective judgment; and that the government's use of the identification resulted in a deprivation of due process. Wright v. United States, supra.

Appellant has made a showing that the police-wagon identification was unfair and suggestive and resulted in tainted in-court identification. Since the identification of Appellant by Barbara Nichols was the only identification connecting the Appellant with the actual time and place of the crime, there can be no question of harmless error. See Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

It is respectfully submitted that without the complaining witnesses' identification, the record does not contain evidence sufficient to have found the Appellant guilty beyond a reasonable doubt. Scurry v. United States, 120 U.S.App. D.C. 374, 347 F.2d 468(1965); Bishop v. United States, 71 U.S.App.D.C. 132, 107 F.2d 297(1939). In this totality of circumstance, the conviction must be reversed.

CONCLUSION

Accordingly, it is respectfully submitted that the judgment of conviction and the sentencing thereafter imposed by the trial court on Appellant,

George W. Bates, should be reversed.

Respectfully submitted,

/s/ Nelson Deckelbaum

NELSON DECKELBAUM
Attorney for Appellant
(Appointed by this Court)

ISSUE PRESENTED*

1. Did the on-the-scene identification of appellant by the complaining witness minutes after the offense violate due process of law and result in a tainted in-court identification?

---

* This case has not previously been before this Court under the same or similar title.

INDEX

TABLE OF CASES

OTHER REFERENCES

---

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,434

GEORGE W. BATES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Summary of Proceedings

By indictment filed on September 14, 1966, appellant was charged with two counts of housebreaking (22 D.C. Code § 1801) and two counts of assault with a dangerous weapon (22 D.C. Code § 502).[1] On September 23, 1966 a

[1] The four count indictment arose out of an incident occurring on the night of July 12, 1966 at 1262 New Hampshire Avenue, Northwest, Apartment 4, in the District of Columbia. Count 1 charged an entry with the intent to commit larceny; count 2 charged an entry with the intent to commit an assault; count 3 charged an assault with a knife on Barbara C. Nichols; and count 4 charged an assault with a knife on Jennie Skerl.

plea of not guilty was entered. On October 14, 1966 the appellant was found competent to stand trial by Judge Bryant. The trial commenced on February 1, 1967 before Judge Sirica and a jury and terminated on February 7, 1967 upon a verdict of guilty on counts 2, 3 and 4. On March 23, 1967 the appellant was sentenced to a term of 5 to 15 years on count 2 and 3 to 10 years each on counts 3 and 4, all sentences to run concurrently. This appeal followed.[2] Appellant contends for the first time on appeal that the on-the-scene identification by the complaining witness, Barbara C. Nichols, was so suggestive that it violated appellant's right to due process of law and resulted in a tainted in-court identification.

B. The Offense

On the night of July 12, 1966 the Misses Barbara C. Nichols and Jennie Skerl were roommates living at 1262 New Hampshire Avenue, Northwest, Apartment 4, in the District of Columbia (Tr. 4).[3] On that night Miss Skerl went to bed at about 11:00 p.m. and Miss Nichols retired at about 11:30 p.m. (Tr. 9). While no lights were on in the bedroom, the illumination from a street light located

---

[2] Appellee submits that there appears to be a jurisdictional defect in this appeal in that the judgment appealed from was filed on March 30, 1967 but the notice of appeal was not filed until October 16, 1967. Appellee is aware of the October 16, 1967 order of Judge Sirica granting appellant leave to file a notice of appeal upon his finding that a notice of appeal "was not timely filed due to the excuseable neglect of counsel." We are at a loss, however, to see where the District Judge had authority to enter such an order. See Fed. R. Crim. P. 37(a)(2). Accordingly, appellee submits that this appeal should be dismissed. Since however this court may be satisfied that it has jurisdiction, the appellee will treat the issue raised on its merits.

[3] The transcript of the testimony, the charge and the verdict is contained in three volumes with consecutive pagination. The Court should note that while Volume I terminates at page 34 and Volume II commences at page 101, there is no omission of any portion of the proceedings below. References to these volumes will appear as Tr. followed by the page number. The closing arguments of counsel and a discussion of the instructions to be given the jury are contained in a separate volume to which no references are made.

on 21st Street was "shining fairly brightly into the bedroom"; also, a firelight which is on all the time threw some illumination into the living room area of the apartment (Tr. 10).

At approximately 11:35 p.m. Miss Nichols, who had been laying on her bed for only a few minutes, opened her eyes and being able to see clearly into the living room from her bed, "noticed a figure going through the living room." The intruder approached and stood at the bedroom door and when asked by Miss Nichols who was there he entered the bedroom and stood in front of both beds facing both young ladies. Miss Skerl awakened by the voice of her roommate sat up and observing the intruder in the room asked "who is there." The intruder responded, "don't move or I'll shoot." (Tr. 11-12.) He warned Miss Nichols not to put the light on and told her to get on Miss Skerl's bed. He got on the edge of the bed with a knife in his left hand. A thick light-colored bandage was wrapped from above the kunckles to the end of the wrist of the knife hand. After asking if they had any money, he told Miss Skerl to get onto Miss Nichols' bed and led her there with the knife against her hip. He covered her up with a sheet, told her to stay there, and while sitting on the bed with Miss Nichols began talking to her. (Tr. 13-14.)

He pulled Miss Nichols "nighty" up to her neck and while holding the knife in his left hand between himself and her, he began to fondle her vagina with his right hand. Still holding the knife he "began to suck one of [her] breasts." (Tr. 14-16.)

Miss Nichols asked him to put the knife down because it was making her nervous; he complied placing it on a table between the beds. At this time Miss Skerl from under the sheet asked "Mister, Mister, what are you doing." As he turned towards her, Miss Nichols grabbed the knife. A brief struggle ensued during which he tried to repossess the knife. When Miss Nichols yelled, "Jennie, I have the knife," Miss Skerl jumped from the other bed. (Tr. 16.)

As Miss Skerl ran past the foot of the bed, the intruder saw her and reached out for her. "I think he grabbed my arm but I shook loose and kept running. At that time Barbara and I both started screaming and he started saying 'no, no' then as I reached the living room he grabbed me and threw me down on the living room floor but I broke loose from him and I ran to our door—you have to run down a couple of steps before you get to our door. I ran to our door, opened it, ran out to the steps and he grabbed me from behind and threw me down and ran past me down the steps" (Tr. 171-72). While the intruder and Miss Skerl struggled, Miss Nichols ran over to the open window and "threw the knife out into the street" (Tr. 17). The intruder gone, Miss Nichols went downstairs to see what happened to her roommate and at 11:50 p.m. they returned to the apartment and locked the door (Tr. 18, 173-74).

At the trial Miss Nichols positively identified the appellant George W. Bates as the intruder (Tr. 18-19). Also she identified Government Exhibit 1 as looking like the knife the appellant had in his possession and Government Exhibits 2 and 3 as appearing to be the shirt and trousers worn by appellant on the night of July 12, 1966 (Tr. 20-22).[4]

C. The Apprehension of Appellant

Between 11:35 p.m. and 11:40 p.m. on the evening of July 12, 1966, police Officer Thomas Lewis while on duty in the vicinity of the 1200 block of New Hampshire Avenue, N.W., heard a woman's scream[5] coming from the vicinity of the rear of 1262 New Hampshire Avenue,

---

[4] Miss Skerl testified that she could not identify the intruder other than that he was of small build, had a long-shaped head, and was wearing dark work clothes. She explained that she wears contact lenses which she did not have on when she went to bed. (Tr. 168, 173.)

[5] According to the Misses Nichols and Skerl, they were screaming continuously from the time Miss Nichols grabbed the knife until appellant ran down the stairs (Tr. 17, 191).

N.W. (Tr. 194-195). He ran to the back of the building where he heard two woman screaming that there was a man in their room (Tr. 196). Running to the front of the building, he observed [6] a man about 25 feet from the entrance. Officer Lewis yelled for him to stop and placed a lookout for a housebreaker on his portable two-way radio. The man ran south on New Hampshire Avenue crossing an intersection at 21st street. (Tr. 197-99.)

Officer Lewis, not able to fully observe the fleeing man's face, could not positively identify the appellant. He did however testify that the fleeing man was a negro of medium build and complexion, was wearing a green shirt and dark trousers and that he resembled the appellant. (Tr. 199-201.)

At approximately 11:45 p.m., plainclothesman Jose L. Estrada and his partner, Private Leonard Aquilino, were stationed in a park near the corner of New Hampshire Avenue and 21st Street when they heard screams (Tr. 211-13, 226). Upon approaching the area of the screams they observed a negro male running in the middle of the street. They called to him that they were the police and told him to stop. When he reached the corner of New Hampshire Avenue and 21st Street he slowed down, turned towards them, looked at them and then increased his speed. At this time appellant was approximately 30 feet away from the officers. (Tr. 213-16, 229.)

Both officers got a good look at appellant's face and both positively identified him as the man they observed (Tr. 217, 221, 227, 230). According to their testimony he had a mustache and was wearing a green shirt, dark trousers and black tennis shoes similar to the Government's exhibits. Also, both observed a white cloth or

---

[6] The running man was about 25 to 50 feet from Officer Lewis when first observed (Tr. 197). In the area the man was running "the lighting condition was . . . fair because there were street lights there" (Tr. 199). Officer Lewis did not observe anyone else on the street at this time (Tr. 210).

handkerchief wrapped around his hand. (Tr. 216, 222, 228.)[7]

Officers Estrada and Aquilino chased appellant and lost him in the vicinity of New Hampshire Avenue and Ward Place, a distance of about 2 blocks from where they first observed him (Tr. 217). After losing the appellant, the officers observed a scout car and had a brief conversation with its occupants, one of whom was Officer Gerald P. Bloodworth (Tr. 219).

Officer Bloodworth testified that at about 11:35 or 11:40 p.m., he observed the appellant walking through an alley onto 22nd Street. "He drew my attention by speaking to me and on his left hand he had what appeared to be a white bandage—handkerchief."

At approximately 11:45 p.m., some 5 minutes after he first observed the appellant, Officer Bloodworth saw him on the front porch of 2209 M Street[8] at which time he

---

[7] Officer Estrada testified that what appeared to be a white handkerchief was around the left hand (Tr. 222). Officer Aquilino observed the white object but could not specify the hand (Tr. 228). Officer Estrada testified that the tennis shoes were black and that he has never seen anyone else wearing the same type of shoes. Also, he did not observe anyone on this date other than the appellant wearing the same type of clothing. Officer Aquilino thought the tennis shoes were black but wasn't sure. (Tr. 223, 225.)

[8] Mrs. Constance Green who lives at 2209 M Street, Northwest, with her husband, testified that on the night of July 12, 1966 she was sitting on her porch. Sometime between 11:30 p.m. and 12:00 midnight she observed the appellant, known to her as "Pogie", running around the corner of 22nd Street onto M Street coming in the direction of her house. When he got to the house he stopped. She knew the appellant as a neighbor for about 1 year. (Tr. 235-38.)

Mrs. Green and her husband observed that the appellant was "puffing", "blowing" and "perspiring". The appellant explained that he had been racing with another boy but Mrs. Green did not observe anyone running with him. When the Greens inquired about the police activity in the area, the appellant, according to Mrs. Green, said it had something to do with a lady screaming somewhere aroung N Street. (Tr. 239-40.)

Mrs. Green testified that the appellant remained on her front steps for about 5 minutes before the policeman came (Tr. 241).

We note that when confronted by the police officer in the presence of the Greens the appellant allegedly stated, "I have been here about an hour with these people"; the Greens disputed this by telling the officer that the appellant hadn't been there for more than 5 minutes (Tr. 244).

took him into custody.[9] At the time of his apprehension, the appellant was dressed in the same manner as when first observed by the officer except he did not have the white handkerchief or bandage around his hand. (Tr. 257-60.)

D. The On-the-Scene Identification

The appellant was placed in a scout car and was immediately taken to the vicinity of the crime where he was placed in a patrol wagon (Tr. 271-73).

Shortly after midnight, both Miss Nichols and Miss Skerl were asked to look at the wagon's occupant to see if they could identify him. Each observed him out of the other's presence. Miss Skerl testified that when she observed the appellant in the wagon she could not identify him as the intruder by his face but that he had the same shaped head and same general appearance. She testified that approximately 25 minutes elapsed from the time that she first saw the intruder in the apartment and the time that she observed the appellant in the patrol wagon.

Miss Nichols positively identified the appellant as her assailant.[10] At this time he did not have the white bandage on his hand. She testified that no police officer told her to identify the appellant as the man who was in her

---

[9] Officer Bloodworth out of the presence of the jury explained his actions as follows: "I saw this subject, the defendant, walking through the alley. I then continued on. I didn't stop the subject. As I said he spoke to me, proceeded north on 22nd Street. When I observed a plainclothesman, Officer Estrada running between Ward Place and N Street and he stated to me he had just heard screams and saw a negro male subject with a white bandage on his hand run west on Ward Street—Ward Place N.W. At that time I stated to him that I had just observed a subject fitting this description and we * immediately continued to cruise the area at which time we saw him sitting on the porch there a couple of minutes after." (Tr. 268-69.)

* Officer Bloodworth was assigned to Scout Car #33 with Private Arthur Henderson.

[10] Prior to the identification on the scene Miss Nichols had described the appellant as being a small colored man wearing dark work clothes (Tr. 133-34).

apartment. Miss Nichols estimated that approximately 10 minutes elapsed from the time the appellant fled her apartment until she saw him in the custody of the police. (Tr. 32-33, 125, 133-35, 137, 144-46, 175, 180-81, 184-86.)[11]

ARGUMENT

The on-the-scene identification minutes after the offense was not violative of due process standards and the victim's eye-witness identification testimony was therefore properly admitted at trial.

(Tr. 10, 21, 127, 129, 130, 136)

At the very outset we submit that the procedure complained of here was upheld by this Court in *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967) and *Walker* v. *United States*, D.C. Cir. No. 20,309, decided June 17, 1968.[12]

The prompt confrontation procedure followed in this case is a reasonable and necessary procedure required for effective and intelligent law enforcement. If anything, such a fresh identification promotes fairness by assuring reliability.[13] At least as important as the accuracy of identification is the very damaging effect on law enforcement that a delay for a lineup would entail, if the police have the wrong man. The crucial time period for apprehending the offender, in many offenses as here where the offender is not known to the victim, is only a matter of

---

[11] We note from the record that when Miss Nichols went to observe the appellant in the patrol wagon he allegedly stated several times, "Yes, I am the one, Yes, I am the one, Yes, I am the one" (Tr. 181-83).

[12] See *State* v. *Keeney*, 425 S.W.2d 85 (Sup. Ct. Mo. 1968); *People* v. *Rodriguez*, 29 A.D.2d 891, 288 N.Y.S.2d 853 (1968); *People* v. *Harris*, 92 Ill. App.2d 412, 236 N.E.2d 281 (1968).

[13] This factor has been specifically recognized by this Court in *Wise* v. *United States*, *supra* at 281, and in *Wright* v. *United States*, D.C. Cir. No. 20,153, decided January 31, 1968, slip op. 7, n. 26.

minutes immediately following the offense.[14] If the police have to wait for the period of time necessary to assemble a lineup, a negative identification might very well spell the end of the case. Prompt confrontation in the event of negative identification permits not only quick release of the innocent suspect, but quick return of the police to canvass the area for the right suspect.

These general considerations are vividly illustrated by the facts of the present case. At about 11:35 p.m., Miss Nichols was the victim of a housebreaking and sexual assault at knifepoint. The screams of she and her roommate attracted the attention of nearby police officers who observed a man in dark work clothing flee from the direction of the crime. At the time of his apprehension it was possible that the appellant was innocent and that the night-time intruder was still in the area, perhaps ready to strike again. The eye witness was readily available and the point of confrontation was only minutes away. The prospects for a very speedy lineup under day-time circumstances were not realistically present. A negative identification would have caused the release of appellant and would have sent the police back to the streets to find the right man.

Appellant argues that the on-the-scene confrontation offended due process standards.[15] Whether or not a pretrial identification procedure is vulnerable to a due process attack depends on the totality of the circumstances. *Stovall* v. *Denno*, 388 U.S. 293 (1967). In amplifying this rule in *Simmons* v. *United States*, 390 U.S. 377, 384 (1968), the Supreme Court stated that convictions based on eyewitness identification at trial following a pre-trial identification will be set aside on that ground only if the

---

[14] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 7-10 (1967).

[15] The pretrial identification here occurred prior to June 12, 1967. Accordingly, there is no issue of whether the identification procedures violated the counsel requirements of *United States* v. *Wade*, 388 U.S. 218 (1967). See *Wright* v. *United States*, D.C. Cir. No. 20,153, decided January 31, 1968.

"identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

We submit that the totality of the circumstances shows that Miss Nichols at the time of the offense had the appellant under observation for 10 to 15 minutes under favorable lighting conditions[16] (Tr. 10, 130); that she was reasonably calm while appellant was in the apartment (Tr. 136); that prior to the street identification she had given a general description of appellant which was accurate; that the appellant was positively identified by police officers Estrada and Aquilino moments after the offense; that as the intruder, the appellant had a white bandage or handkerchief wrapped around his left hand; that other than police officers the appellant was the only person observed in the vicinity of the offense at the crucial time; that the police responded quickly (Tr. 129) and apprehended the appellant minutes after the offense; that the on-the-scene identification occurred a very short time after the offense; and when she confronted appellant she was not in the presence of the other complaining witness. In light of these facts the possibility of a mistaken identification is more than remote.[17]

---

[16] The light was sufficient for her to observe that the knife held by appellant was discolored (Tr. 21, 127).

[17] Regardless of what the requirements may be regarding pretrial identification, the Congress has recently directed that an identification procedure not meeting the requirements shall not preclude the witness from identifying the accused at trial. *Omnibus Crime Control and Safe Streets Act of 1967*, P.L. 90-351, Title II, § 3502, 82 Stat. 211 (1968). Since the totality of the circumstances in this case reveal that the pre-trial identification did not violate due process standards and was not conducive to an irreparable misidentification we feel it is unnecessary to discuss the effect of this recent legislation.

CONCLUSION

WHEREFORE, it is respectfully submitted that assuming jurisdiction,[18] that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
ROBERT S. BENNETT,
Assistant United States Attorneys.

[18] See footnote 2.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 319097 165